

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.
Division of Judges

COASTAL MARINE SERVICES, INC.

and

Case 21-CA-139031

INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS
AND ALLIED WORKERS, LOCAL 5

RESPONDENT COASTAL MARINE SERVICES, INC.'S POST HEARING BRIEF

Before the Honorable Robert Giannasi, Chief Administrative Law Judge

To: The Honorable Robert Giannasi
Chief Administrative Law Judge
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570

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Respondent Coastal Marine Services, Inc. ("CMSI") by and through its undersigned counsel and pursuant to Section 102.42 et. seq. of the Board's Rules and Regulations as amended, timely files the following Post-Hearing Brief following submission of a Partial Stipulation of Facts.

I. PROCEDURAL HISTORY

On October 17, 2014, International Association of Heat & Frost Insulators and Allied Workers, Local 5 ("Union") filed the original charge with the Regional Director for Region 21 against Coastal Marine Services, Inc. ("CMSI"). *Exhibit 1 to Partial Stipulated Record ("PSR")*. The Union filed a first amended charge with the Regional Director for Region 21 on November 12, 2014. *Exhibit 2 to PSR*. The Union filed a second amended charge with the Regional Director for Region 21 on January 21, 2015. *Exhibit 3 to PSR*. On April 10, 2015, the Union filed a third amended charge. *Exhibit 4 to PSR*.

On May 28, 2015, the General Counsel of the Board, by the Regional Director for Region 21 issued a Complaint and Notice of Hearing against Respondent. *Exhibit 5 to PSR*. Respondent filed with the Regional Director, and served upon the Union, an Answer and Affirmative Defenses to the Complaint on June 10, 2015. *Exhibit 6 to PSR*. A hearing was originally scheduled for August 17, 2015 and was later rescheduled to September 29, 2015.

On September 17, 2015 counsel for Respondent filed a motion requesting an extension of the hearing date, as both parties were committed to negotiating and settling most of the charges in the complaint. The hearing was then continued to December 8, 2015. The negotiations were successful, as the Regional Director and Respondent reached agreements on all of the charges in the Complaint with the exception of paragraph 4 regarding Respondent's arbitration agreement. On December 4, 2015, the Regional Director issued an order postponing the hearing indefinitely. On the same date, the General Counsel and Respondent filed a Partial Stipulation of Facts with Exhibits, specifically requesting a decision based on the partial stipulation and briefs as pertaining

to paragraph 4 of the Complaint. Paragraph 4 alleges that since at least April 24, 2014, the Company has maintained as a condition of employment for all of its employees at its San Diego facility an “Employee Acknowledgement and Agreement” (the “Agreement”) that contains provisions requiring employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any rights they have to resolve disputes through collective or class action, in violation of Section 8(a)(1) of the National Labor Relations Act (the “Act”). A copy of the Agreement is found at *Exhibit 7 to PSR*. The Division of Judges approved the Partial Stipulation, and ordered both parties to submit briefing on this one issue.

II. STATEMENT OF FACTS

CMSI began over thirty years ago as a small family-owned and operated business offering construction subcontracting services, including insulation, decking, and lagging work. CMSI specializes in construction work on military craft, and its clientele include the United States Navy and a variety of defense contractors.

CMSI’s San Diego facility is located at 2255 National Avenue. Currently, CMSI employs approximately 200 workers in San Diego who are working at several job sites in and around the San Diego harbor. CMSI’s construction workers report for work directly to their job site, which typically includes a military or private dry dock in the San Diego harbor. CMSI’s construction workers do not report to the CMSI’s facility to work. Instead, they visit CMSI’s facility only occasionally to complete HR paperwork or other administrative tasks. A typical CMSI employee may only report to CMSI’s facility one or two times per year.

Due to, among other things, an increase in its workforce, CMSI updated its 20-year old Employee Handbook in early 2014. CMSI issued its new 2014 Employee Handbook on April 25, 2014. CMSI’s 2014 Employee Handbook includes an individual agreement to arbitrate claims between the employee and CMSI. The arbitration agreement includes a waiver of the employee’s right to pursue a class claim in arbitration, but allows the employee to “opt out” of the class waiver by checking a box located in the agreement. CMSI instituted the class waiver per a routine update

of its corporate policies, including its Employee Handbook. The timing of CMSI's update coincides with an uptick in CMSI's workforce as a result of the gradual economic recovery following the "Great Recession" of 2008.

III. LEGAL ARGUMENT

Respondents acknowledge the *D.R. Horton* and *Murphy Oil* decisions, and the high likelihood that the Administrative Law Judge will utilize solely these two administrative decisions as the legal authority for finding a violation of the Act. It is nonetheless important to recognize that these two decisions have been universally rejected by civil and appellate courts, such that the NLRB has refrained from appealing the matter to the United States Supreme Court, instead retreating back to a self-serving philosophy that absent the high court's intervention, it must continue to rely on the two administrative decisions. Respondents, throughout this process, have challenged the Board to identify a single federal court case supporting the Board's position on the issue of whether it is a violation of an Act when an employer enforces a pre-dispute arbitration agreement with a class-action waiver. The Board has yet to provide any such authority.

The NLRB seeks to invalidate the Agreement contained in CMSI's employee handbook based on the argument that the Agreement restricts employees' rights to pursue employment claims on a class or collective basis in violation of Board decisions *D.R. Horton* and *Murphy Oil*. This argument is flawed and therefore fails. First, *D.R. Horton* and *Murphy Oil* are no longer good law. Second, employees are not restricted from exercising their rights to bring collective or class actions on behalf of other employees because they have the ability to opt-out of the class action arbitration waiver by checking a box on the Agreement.

In short, the evidence presented in the Partial Stipulation of Facts, coupled with Federal and California case law, support a finding that the inclusion of a class action waiver in a pre-dispute arbitration agreement does not give rise to an unfair labor practice as a matter of law. As such, Respondent respectfully requests the Administrative Law Judge issue findings of fact and law that Respondent has not violated any employees' rights under the Act.

A. Appellate Decisions Reviewing *D.R. Horton* and *Murphy Oil* Have Universally Rejected These Administrative Decisions.

1. *D.R. Horton* Is No Longer Good Law.

D.R. Horton, Inc., 357 NLRB No. 184 (2012) held that the Act provides employees an unwaivable substantive right to collective litigation. However, as explained below, *D.R. Horton* conflicts with U.S. Supreme Court precedent and the applicable law. Five Circuit Courts of Appeals have opined on the NLRB's administrative decision in *D.R. Horton*. The courts universally, and without any qualification, have struck down the NLRB's interpretation of the law and upheld the inclusion of a class action waiver in a pre-dispute arbitration agreement. These decisions will be discussed in turn below.

The Eighth Circuit Court of Appeals first reviewed the *D.R. Horton* decision in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). In that case, Sharon Owen executed an arbitration agreement with her employer, Bristol Care, Inc., that included a class action waiver. *Id.* at 1051. When the employer attempted to enforce that agreement against a class action claim Ms. Owen filed in the Western District of Missouri, the employee argued that the agreement was void pursuant to *D.R. Horton*. *Id.* at 1053–54. The Eighth Circuit flatly rejected both Owen's argument and the NLRB's *D.R. Horton* analysis. The *Owen* court determined that (1) the United States Supreme Court expressly held in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012), that the FAA requires governing bodies to enforce arbitration agreements according to their terms absent a contrary Congressional command; and (2) such a contrary command does not exist in relation to the Act. *Id.* at 1052–54.

The Second Circuit Court of Appeals subsequently reviewed *D.R. Horton*. In *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 292 (2nd Cir. 2013), Stephanie Sutherland executed an arbitration agreement that included a class action waiver. When the employer attempted to enforce that agreement against a class action claim Ms. Sutherland filed in the Southern District of New

York, the employee argued that the agreement was void pursuant to *D.R. Horton*. *Id.* at 297. The Second Circuit flatly rejected the argument, adopting the *Owen* court’s analysis. *Id.*

The Ninth Circuit Court of Appeals later reviewed the NLRB’s decision in *Richards v. Ernst & Young, LLP*, 734 F.3d 871 (9th Cir. 2013) *opinion amended and superseded*, 744 F.3d 1072 (9th Cir. 2013) [hereinafter *Richards I*.] There, Michelle Richards opposed her employer’s motion to compel arbitration of her civil claims based, in part, on the argument that the underlying arbitration agreement was void pursuant to the NLRB’s *D.R. Horton* decision. 734 F.3d at 873–74. The Ninth Circuit likewise flatly rejected both Richards’s argument and the NLRB’s *D.R. Horton* analysis. The *Richards I* opinion determined that (1) the United States Supreme Court expressly held in *American Express v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2309 (2013), that the FAA requires governing bodies to enforce arbitration agreements according to their terms absent a contrary Congressional command; and (2) such a contrary command does not exist in relation to the Act. *Id.*

The Fifth Circuit Court of Appeals later recognized *Richards I* as having rejected *D.R. Horton*. *D.R. Horton Appeal*, 737 F.3d at 362. Shortly thereafter, the Ninth Circuit amended its *Richards I* decision, moving the entire *D.R. Horton* analysis to a footnote, and newly qualifying the analysis with “Without deciding the issue....” *Richards*, 744 F.3d at 1075, fn. 3. However, the remainder of the footnote is almost identical to the previous analysis in *Richards I*, including a criticism of *Brown v. Citicorp Credit Servs.*, No. 1:12-cv-00062, 2013 WL 645942 (D. Idaho Feb. 21, 2013), for “failing to consider countervailing policies or deference with respect to the FAA.” *Compare Richards I*, 734 F.3d at 873–74, n.3; *Richards II*, 744 F.3d at 1075, n.3. As the *Brown* court later recognized in reconsidering and reversing its decision, the continued criticism “signaled” the Ninth Circuit’s continuing rejection of *D.R. Horton*. *Brown v. Citicorp Credit Servs., Inc.*, No. 1:12-CV-00062-BLW, 2015 WL 1401604, at *2 (D. Idaho Mar. 25, 2015). The inclusion of the analysis is telling as the Ninth Circuit neither changed its position on the *D.R. Horton* decision nor did it invalidate the arbitration agreement at issue on the proposition that it violated the Act.

In *Davis v. Nordstrom*, 755 F.3d 1089 (9th Cir. 2013) and *Johnmohammadi v. Bloomingdale's Inc.*, 755 F.3d 1072 (9th Cir. 2013), the Ninth Circuit again was presented with the issue of whether a pre-dispute arbitration agreement with a class action waiver violated the Act, the FAA, or other federal law. In *Davis*, the Ninth Circuit elected not to review the employee's argument that the class action waiver violated the Act, but nonetheless enforced a pre-dispute arbitration agreement containing a class action waiver. *Davis*, 755 F.3d at 1095, fn.5. In *Johnmohammadi*, the Ninth Circuit held that the employer's pre-dispute arbitration agreement with a class action waiver did not violate the Act because the employee "freely elected to arbitrate employment-related disputes on an individual basis." *Johnmohammadi*, 755 F.3d at 1077. In sum, the Ninth Circuit on four occasions has issued rulings involving pre-dispute arbitration agreements with class action waivers that were challenged on the grounds that they violated the Act. On each occasion, the court enforced the pre-dispute arbitration agreement with the class action waiver.

The consistency of the Ninth Circuit's enforcement has been relied upon by district courts over the past two years in similarly enforcing pre-dispute arbitration agreements in the employment context containing class action waivers. In *Nanavati v. Adecco USA Inc.*, No. 14-cv-04145-BLF, 2015 WL 1738152, (N.D. Cal. Apr. 13, 2015); *Chico v. Hilton Worldwide*, No. CV 14-5750-JFW, 2014 WL 5088240, (C.D. Cal. Oct. 27, 2014); and *Longnecker v. American Express Corp.* 23 F. Supp. 3d 1099, 1112 (D. Ariz. 2014), the district courts have utilized Ninth Circuit precedent in enforcing pre-dispute arbitration agreements with class action waivers that were challenged by employees on the grounds that such agreements were enforceable because they violated the Act.

As stated above, after the *Richards I* decision, the Fifth Circuit Court of Appeals heard the direct appeal of *D.R. Horton*. *D.R. Horton Appeal*, 737 F.3d at 344. Similarly to its sister-Circuit Courts of Appeal, the Fifth Circuit rejected the NLRB analysis, holding that the Act "should not be understood to ... override[e] application of the FAA." *Id.* at 362. In reasoning that class actions waivers are enforceable, the court stated:

The issue here is narrow: do the rights of collective action embodied in this labor statute make it distinguishable from cases which hold that arbitration must be individual arbitration? *See* [AT&T Mobility LLC v.] *Concepcion*, 131 S.Ct. [1740] at 1750-53. We have explained the general reasoning that indicates the answer is ‘no.’ We add that we are loath to create a circuit split. Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable.

*Id.*¹

The Eleventh Circuit Court of Appeals reviewed *D.R. Horton (Appeal)* in *Walthour, v. Chipio Windshield Repair, LLC.*, 745 F.3d 1326, 1340 (11th Cir. 2014). In *Walthour*, plaintiffs Ashley Walthour and Kevin Chappell opposed their employer's attempt to compel their class action wage-hour claims to individual arbitration. Walthour and Chappell claimed that the class action waiver provision contained in the arbitration agreements they executed violated the Fair Labor Standards Act (“FLSA”). The Eleventh Circuit followed the Fifth Circuit's analysis in *D.R. Horton (Appeal)* in finding the provision enforceable – and in doing so recognized that: (1) “[i]n every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA;” and (2) neither the FLSA nor the Act contains a contrary congressional command overriding the application of the Federal Arbitration Act. *Walthour*, 745 F.3d at 1332, 1336 (quoting Fifth Circuit in *D.R. Horton*, 737 F.3d at 357).

District courts across the United States have consistently followed the precedent established by the Fifth Circuit, and there is no dispute over the infirmities of *D.R. Horton*. Regardless of circuit, state, or district, federal courts continue to find that pre-dispute arbitration agreements in the employment context may contain a class-action waiver. *See, e.g., Nanavati v. Adecco USA, Inc.*, 2015 WL 4035072, at *1 (N.D. Cal. June 30, 2015); *Levinson v. Mastec, Inc.*, 2015 WL 502164, *2 (M.D. Fl. August 26, 2015); *Ortiz v. Hobby Lobby Stores*, 52 F.Supp.3d 1070, **12–13 (E.D. Cal. 2014); *Longnecker v. American Express Company* 23 F.Supp.3d 1099,

¹ The Fifth Circuit enforced that part of the *D.R. Horton* decision finding that the particular language used in the arbitration agreement at issue in the matter would lead an employee to reasonably believe that he or she was prohibited from filing unfair labor practice charges with the agency.

1112–13 (D. Ariz. 2014); *Green v. Zachry Industrial*, 36 F.Supp.3d 669, 675 (W.D. Va. 2014); *Hickey v. Brinker International Payroll Company LP*, 2014 WL 622883 at **3–4 (D. Colo. Feb. 18, 2014); *Zabelny v. Cashcall*, 2014 WL 67638 at **16–19 (D. Nev. Jan. 8, 2014); *Siy v. Cashcall*, 2014 WL 37879 at **16–19 (D. Nev. Jan. 6, 2014); *Sylvester v. Wintrust Financial Corp.*, Case No. 12 C 01899 at **15–17 (N.D. Ill., Sep. 30 2013); *Morris v. Ernst & Young*, 2013 WL 3460052 at **17–21 (N.D. Cal. Jul. 9, 2013); *Dixon v. NBCUniversal Media, LLC*, 947 F.Supp.2d 390, 402–03 n.11 (S.D.N.Y. 2013); *Birdsong v. AT&T Corp.*, 2013 WL 1120783 at *9 n.4 (N.D. Cal. Mar. 18, 2013); *Long v. BDP Intern., Inc.*, 919 F. Supp.2d 832, 852 n.11 (S.D. Tex. 2013); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726, at *2 (S.D. Tex. Oct. 4, 2012); *Tenet Health System Phila., Inc. v. Rooney*, 2012 WL 3550496, at *4 (E.D. Pa. Aug. 17, 2012); *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F.Supp.2d 784, 786–92 (E.D. Ark. 2012); *Luchini v. Carmax, Inc.*, 2012 WL 2995483, at *7 (E.D. Cal. July 23, 2012); *Spears v. Mid-America Waffles, Inc.*, 2012 WL 2568157, at *2 (D. Kan. July 2, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F.Supp.2d 831, 841–45 (N.D. Cal. 2012); *Jasso v. Money Mart Express, Inc.*, 879 F.Supp.2d 1038, 1046–49 (N.D. Cal. 2012); *Palmer v. Convergys Corp.*, 2012 WL 425256, at *3–6 (M.D. Ga. Feb. 9, 2012); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012).

2. *Murphy Oil Is No Longer Good Law.*

As seen in *D.R. Horton*, the NLRB decided in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), that the Act provides employees an unwaivable substantive right to collective litigation. The Fifth Circuit Court of Appeals recently reviewed this decision, in *Murphy Oil USA, Inc., v NLRB.*, 808 F.3d 1013 (2015), and just as it did in *D. R. Horton*, the Fifth Circuit upheld the enforceability of a class action waiver in a pre-dispute arbitration agreement.

In *Murphy Oil*, Sheila Hobson executed an arbitration agreement with her employer, Murphy Oil, which included a class action waiver. *Id.* at 1015. When the employer attempted to enforce the agreement against a class action claim Ms. Hobson filed in the Northern District of Alabama, the employees opposed the motion, contending that the FLSA prevented enforcement because it grants a substantive right to a class action that cannot be waived. *Id.* The employees

also argued that the arbitration agreement interfered with their right to engage in Section 7 protected activity. *Id.* While the employer's motion was pending, Ms. Hobson filed an unfair labor charge with the Board alleging that the arbitration agreement interfered with her Section 7 rights under the NLRA. *Id.*² The Board reaffirmed its decision in *D.R. Horton* and found that Murphy Oil's arbitration agreements (the original and revised arbitration agreement) violated Section 8(a)(1). *Id.* Murphy Oil then petitioned the Fifth Circuit for review of the Board's decision. The Fifth Circuit reaffirmed its analysis in its review of the Board's *D. R. Horton* decision and found that Murphy Oil's revised arbitration agreement did not violate the Act. *Id.* at 1018.

In short, the inclusion of a class action waiver in a pre-dispute arbitration agreement does not give rise to an unfair labor practice as a matter of law. Both statute and precedent are clear on this issue.

B. Employees are Able to Opt-Out of Class Action Requirements in Their Arbitration Agreements.

The Parties have stipulated that CMSI has maintained as a condition of employment for all of its employees at the San Diego facility an "Employee Acknowledgement and Agreement." *PSR*, ¶ 6. However, the Agreement contains an opt-out provision, where employees are able to preserve their ability to bring class and collective actions by simply checking the box provided in paragraph 3 of the Agreement. *Exhibit 7 to PSR*. No reasonable employee can assert that they felt the Agreement limited their ability to conduct concerted activity if they could in all actuality opt-out of any class action waiver. The Union and NLRB have failed to find any employee claiming the contrary.

Employees who sign the Agreement have the ability to maintain their rights to bring class actions on behalf of other aggrieved employees. A finding is therefore warranted, based on the

² After the Board's decision in *D. R. Horton*, Murphy Oil implemented a revised arbitration agreement for employees hired after March 2012. The revision provided that employees were not barred by "participating in proceedings to adjudicate unfair labor practice charges" before the Board. *Id.* at *2. Because Ms. Hobson and the other employees were hired before March, the revision did not apply to them. *Id.* The Board's decision was based on both agreements.

evidence presented, that the agreement employees have been presented with in the 2014 employee handbook do not prevent employees from exercising their ability to engage in concerted activity.

C. No Employees Have Engaged in “Concerted Activity.”

Section 7 of the Act protects concerted activity such that an employee must act “with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Rockwell Intern. Corp. v. IV.L.R.B.*, 814 F.2d 1530, 1534 (11th Cir. 1987); *Super Market Serv. Corp. v. Heller*, 227 NLRB 1919, 1927 (1977) (finding no concerted activity based in part on fact that co-employees mentioned in the letter had “no part in writing the letter, no notice when it was to be written [and] no opportunity to make suggestions as to its contents . . .”). *See also E.I. Du Pont De Nemours & Co. v. NLRB*, 707 F.2d 1076, 1078 (9th Cir. 1983) (“The requirement of ‘concert’ denies protection to activity that, even if taken in pursuit of goals that would meet the test of ‘mutual aid or protection,’ is only the isolated conduct of a single employee.”).

In *Meyers Indus.*, 281 NLRB 882, 885 (1986), the Board made it clear that to constitute “concerted activity,” the employee must have engaged in the activity “with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Indus.*, 281 NLRB 882, 885 (1986) (emphasis added). This was reinforced in *Whittaker Corp.*, 289 NLRB 933 (1988), wherein the Board again recognized that the mere individual assertion of a matter “of common concern” to other employees is not concerted action.

Relevant here is that a charging party’s mere filing of a complaint, either with an employer or in court, is not protected by Section 7 absent the employee working in concert with other employees for their mutual aid or protection or seeking to initiate, induce, or prepare for such group action. *Holling Press, Inc.*, 343 NLRB 301 (2004); *K-Mart Corp.*, 341 NLRB 702 (2004). There is no class action civil litigation pending. There is nothing in the record to indicate that that any employees were denied the ability to speak with other employees about signing the arbitration agreement, nor that anyone has spoken with others about suing Respondent. These

facts are fatal to the complaint. *Meyers II*, 281 NLRB at 887 (“We reiterate, our definition of concerted activity in *Meyers I* encompasses...individual employees bringing truly group complaints to the attention of management.”).

D. The NLRB Legal Authority Violates The Administrative Procedures Act.

In response to the *D.R. Horton* decision, the NLRB’s Office of the General Counsel issued Memorandum OM 12-30, revoking its prior Memorandum GC 10-06. No prior notice was given to the public regarding its revocation. Under the prior memorandum, entitled *Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers’ Mandatory Arbitration Policies*, the NLRB’s General Counsel explained the Board’s policy that a class-action waiver in an employment agreement is not *per se* unlawful. Such a position by the Board is unlawful as the new rule does not comport with Sections 553(b) and 553(c) of the Administrative Procedures Act (“APA”) in that no public comments were solicited or considered. See *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005). The NLRB has adopted a new rule without following the notice and rulemaking procedures required by the APA. The NLRB’s actions do not fall within the purview of the “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” none of these exceptions apply under section 553(b)(3)(A) of the act. First, a procedural rule “does not itself ‘alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.’” *Chamber of Commerce of U.S. v. DOL*, 174 F.3d 206, 211 (D.C. Cir. 1999) (citations omitted). That is, the rule does “not impose new substantive burdens.” *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 169 (D.C. Cir. 1997). The change in position by the NLRB has a significant substantive impact on the public at large as demonstrated by the multitude of complaints now being filed by the Board and its conflict with an equal number of court decisions finding that the Board’s position runs contrary to federal law. The practical question inherent in the distinction between legislative and interpretive regulations is whether the new rule effects “a substantive regulatory change” to the statutory or regulatory regime. *U.S. Telecom Ass’n*, 400 F.3d at 34–40. Where, as here, an “interpretation runs 180

degrees counter to the plain meaning of the regulation[, it] gives us at least some cause to believe that the agency may be seeking to constructively amend the regulation.” *Nat’l Family Planning & Reprod. Health Ass’n, Inc. v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992). The plain meaning of the NLRB’s General Counsel Memorandum GC 10-06 was that class action waivers in employment agreements do not *per se* violate the Act.

Finally, the question raised by policy exception “is whether a statement is . . . of present binding effect.” *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 7 (D.C. Cir. 2011). If it is, then the APA calls for notice and comment. Here, the Board’s current rule is presently binding as it is the sole legal authority cited by administrative law judges in reviewing class action waivers in arbitration agreements. *See Murphy Oil USA*, 361 NLRB No. 72 (October 28, 2014). In Memorandum OM 12-30 issued by the NLRB’s Office of the General Counsel, the General Counsel declares: “In *D.R. Horton, Inc.*, the Board held that a policy or agreement that precludes employees from filing employment-related collective or class claims against the employer, in both arbitral and judicial forums, unlawfully restricts the employees’ Section 7 right to engage in concerted action for mutual aid or protection, and violates Section 8(a)(1) of the Act.” In so holding, the Board expressly rejected the construction of the Act advanced in Memorandum GC 10-06, Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the context of Employers’ Mandatory Arbitration Policies (June 16, 2010). Accordingly, the analysis of Memorandum GC 10-0 is no longer valid, and that Memorandum should not be relied upon in any pending or future cases.” As a result, the Board’s policy is binding, and not merely a general statement of policy.

IV. CONCLUSION

The evidence overwhelmingly supports a finding that employees of Respondent would not reasonably conclude that the provisions of the Agreement preclude employees from engaging in conduct protected by Section 7 of the Act. The Agreement is consistent with agreements from all over the country found to be enforceable by federal courts in which the courts have struck down any contrary arguments brought by the NLRB.

For these reasons and those discussed herein, Respondent requests this Board find the arbitration agreement does not violate employees' Section 7 rights under the NLRA.

By: 

Danielle H. Moore
Danielle C. Garcia
Fisher & Phillips LLP
Counsel for Respondent

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges

COASTAL MARINE SERVICES, INC.

and

Case 21-CA-139031

INTERNATIONAL ASSOCIATION OF HEAT &
FROST INSULATORS AND ALLIED WORKERS, LOCAL 5

PARTIAL STIPULATION OF FACTS
WITH EXHIBITS

Before the Honorable Jeffrey Wedekind, Administrative Law Judge

COME NOW Coastal Marine Services, Inc, (Respondent), International Association of Heat & Frost Insulators and Allied Workers, Local 5 (Union), and Counsel for the General Counsel (GC), each a Party and collectively, the Parties, hereby enter into this Partial Stipulation of Facts with Exhibits and jointly petition the Administrative Law Judge (ALJ), in order to effectuate the purposes of the National Labor Relations Act (Act) and to avoid unnecessary costs and delay, to exercise the authority provided by Section 102.35(a)(9) of the National Labor Relations Board's (Board) Rules and Regulations and decide this case partially on this stipulation and attached documents.

1. The Parties agree that the original charge, the first amended charge, the second amended charge, the third amended charge, Complaint and Notice of Hearing, Answer and

Affirmative Defenses to the Complaint, and this Partial Stipulation of Facts, along with the attached exhibits described herein, constitute part of record in this case, and that the balance of the record will be created at the hearing currently scheduled in December 8, 2015.

2. (a) The Union filed the original charge with the Regional Director for Region 21 on October 17, 2014, and a copy was served by regular mail on Respondent on October 20, 2014, receipt of which is acknowledged by Respondent. A copy of the original charge is attached as Exhibit 1.

(b) The Union filed the first amended charge with the Regional Director for Region 21 on November 12, 2014, and a copy was served by regular mail on Respondent on November 13, 2014, receipt of which is acknowledged by Respondent. A copy of the first amended charge is attached as Exhibit 2.

(c) The Union filed the second amended charge with the Regional Director for Region 21 on January 21, 2015, a copy was served by regular mail on Respondent on January 22, 2015, receipt of which is acknowledged by Respondent. A copy of the second amended charge is attached as Exhibit 3.

(d) The Union filed the third amended charge with the Regional Director for Region 21 on April 10, 2015, and a copy was served on Respondent by regular mail on April 13, 2015, receipt of which is acknowledged by Respondent. A copy of the third amended charge is attached as Exhibit 4.

3. On May 28, 2015, the General Counsel of the Board, by the Acting Regional Director for Region 21, acting pursuant to the authority granted in Section 10(b) of the Act, as amended, 29 U.S.C. Sec. 151, et seq., and Section 102.15 of the Board's Rules and Regulations, issued a Complaint and Notice of Hearing against Respondent, a copy of which is attached as Exhibit 5. True copies of the Complaint and Notice of Hearing were duly served by certified mail

upon Respondent and the Union on May 28, 2015, and Respondent acknowledges receipt of the Complaint and Notice of Hearing. An Answer and Affirmative Defenses to the Complaint, a copy of which is attached as Exhibit 6, was duly filed with the Regional Director for Region 21 and served on the Union on June 10, 2015.

4. (a) At all material times, Respondent, a California corporation, with a warehouse facility located in San Diego, California, has been engaged in the nonretail business of performing insulation work on ships.

(b) During the 12-month period ending November 5, 2014, a representative period, Respondent, in conducting its business operations described above in paragraph 4(a), performed services valued in excess of \$50,000 in States other than the State of California.

(c) During the 12-month period ending November 5, 2014, Respondent, in conducting its operations described above in paragraph 4(a), purchased and received at its San Diego, California facility goods valued in excess of \$50,000 directly from points outside the State of California.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

5. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

6. At all material times, and since at least on or about April 25, 2014, Respondent has maintained as a condition of employment for all of its employees at the San Diego facility an agreement titled "Employee Acknowledgement and Agreement," a copy of which is attached to the Complaint as Appendix A, and which is also attached as Exhibit 7.

7. (a) General Counsel takes the position that at all material times since at least on or about April 25, 2014, employees would reasonably conclude that the provisions of the "Employee Acknowledgement and Agreement" attached as Exhibit 7 and described above in paragraph 6, preclude employees from engaging in conduct protected by Section 7 of the Act.

(b) Respondent takes the position that at all material times since at least on or about April 25, 2014, employees would not reasonably conclude that the provisions of the "Employee Acknowledgment and Agreement" attached as Exhibit 8 and described above at paragraph 6, preclude employees from engaging in conduct protected by Section 7 of the Act.

8. The allegations contained in Paragraph 5(a), 5(b), 5(d), and 5(e) of the Complaint attached hereto as Exhibit 5 are not made a part of this Partial Stipulation, as they are the subject of ongoing settlement proceedings. Paragraph 5(c) of the Complaint was previously withdrawn by the Region, and the corresponding portion of the charge was dismissed. A copy of the Order Withdrawing Paragraph 5(c) of Complaint and Notice of Hearing and Dismissing Corresponding Portion of Charge is attached as Exhibit 8.

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9. This Partial Stipulation of Facts is made without prejudice to any objection that any Party may have as to the materiality or relevance of any facts stated herein.

Respectfully submitted,

DATED: December 1, 2015

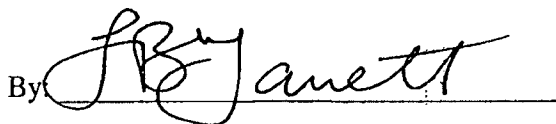
NATIONAL LABOR RELATIONS BOARD

By: 

Ami Silverman
Counsel for the General Counsel

DATED: December 4, 2015

COASTAL MARINE SERVICES, INC.

By: 

Brent Garrett, Attorney
Fisher & Phillips LLP

DATED: December __, 2015

INTERNATIONAL ASSOCIATION OF HEAT &
FROST INSULATORS AND ALLIED WORKERS,
LOCAL 5

By: _____

David Rosenfeld, Attorney
Weinberg Roger and Rosenfeld

LIST OF EXHIBITS

- Exhibit 1 Charge filed October 17, 2014
- Exhibit 2 First Amended Charge filed November 12, 2014
- Exhibit 3 Second Amended Charge filed January 21, 2015
- Exhibit 4 Third Amended Charge filed April 10, 2015
- Exhibit 5 Complaint and Notice of Hearing issued May 28, 2015 with Appendix A
- Exhibit 6 Answer and Affirmative Defenses to the Complaint filed June 10, 2015
- Exhibit 7 Employee Acknowledgement and Agreement described in Paragraph 6
- Exhibit 8 Order Withdrawing Paragraph 5(c) of Complaint and Notice of Hearing and Dismissing Corresponding Portion of Charge issued September 3, 2015.

INTERNET
FORM NLRB-501
(2-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE

Case
21-CA-139031Date Filed
10-17-14

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1 EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Coastal Marine Services, Inc.		b. Tel. No. (619) 291-8176
		c. Cell No.
		f. Fax No. (619) 291-8179
d. Address (Street, city, state, and ZIP code) 2255 National Avenue San Diego, CA	e. Employer Representative	g. e-Mail info@coastalmarineservices.com
		h. Number of workers employed 50+
i. Type of Establishment (factory, mine, wholesaler, etc.) Installation Contractor	j. Identify principal product or service Installation	
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.		

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

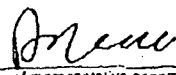
Within the last six months, the above named Employer has maintained an arbitration policy, which restricts the collective rights of employees. Furthermore, the Employer has implemented its arbitration policy in response to collective or concerted activity by the employees.

3. Full name of party filing charge (If labor organization, give full name, including local name and number)

International Association of Heat & Frost Insulators and Allied Workers, Local 5

4a. Address (Street and number, city, state, and ZIP code) 670 East Foothill Blvd., Unit 2 Azusa, CA 91702	4b. Tel. No. (626) 815-9794
	4c. Cell No.
	4d. Fax No. (626) 815-0165
	4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Association of Heat & Frost Insulators and Allied Workers, AFL-CIO

6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.		Tel. No. (510) 337-1001
By  (Signature of representative or person making charge)		Office, if any, Cell No.
David A. Rosenfeld, Attorney (Print type name and title or office, if any)		Fax No. (510) 337-0123
Weinberg, Roger & Rosenfeld 1001 Marine Village Parkway, Suite 200 Alameda, CA 94501		e-Mail
10/17/14 (date)		

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

1/784415

Exhibit 1

INTERNET
FORM NLRB-601
(7-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
FIRST AMENDED CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE

Case 21-CA-139031	Date Filed 11-12-14
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INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Coastal Marine Services, Inc.	b. Tel. No. (619) 291-8178
	c. Cell No.
d. Address (Street, city, state, and ZIP code) 2255 National Avenue San Diego, CA	e. Employer Representative
	f. Fax No. (619) 291-8179
	g. e-Mail info@coastalmarineservices.com
i. Type of Establishment (factory, mine, wholesaler, etc.) Installation Contractor	h. Number of workers employed 50+
	j. Identify principal product or service Installation

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Within the last six months, the above named Employer has maintained and enforced illegal rules that interfere with the Section 7 rights of employees.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

International Association of Heat & Frost Insulators and Allied Workers, Local 5

4a. Address (Street and number, city, state, and ZIP code)

670 East Foothill Blvd., Unit 2
Azusa, CA 91702

4b. Tel. No. (626) 815-9794

4c. Cell No.

4d. Fax No. (626) 815-0165

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Association of Heat & Frost Insulators and Allied Workers, AFL-CIO

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

Tel. No. (510) 337-1001

By

David A. Rosenfeld, Attorney

(signature of representative or person making charge)

(Print type name and title or office, if any)

Office, if any, Cell No.

Fax No. (510) 337-0123

e-Mail

Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

11/10/14

(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit 2

1/787473

SECOND AMENDED

FORM EXEMPT UNDER 44 U.S.C. 3512

INTERNET
FORM NLRB-501
(2-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case 21-CA-139031

Data Filed 1-21-15

INSTRUCTIONS:

File an original with NLRB Regional Director for the Region in which the alleged unfair labor practice occurred or is occurring

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT		
a. Name of Employer Coastal Marine Services, Inc.		b. Tel. No. (619) 291-8176
		c. Cell No.
		f. Fax No. (619) 291-8179
d. Address (Street, city, state, and ZIP code) 2255 National Avenue San Diego, CA	e. Employer Representative	g. e-Mail info@coastalmarineservices.com
		h. Number of workers employed 50+
i. Type of Establishment (factory, mine, wholesaler, etc.) Installation Contractor	j. Identify principal product or service Installation	
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (1)(B) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act		
Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Within the last six months, the above named Employer has maintained and enforced [which includes implementing] illegal rules that interfere with the Section 7 rights of employees.		
2. Full name of party filing charge (if labor organization, give full name, including local name and number) International Association of Heat & Frost Insulators and Allied Workers, Local 5		
4a. Address (Street and number, city, state, and ZIP code) 670 East Foothill Blvd., Unit 2 Azusa, CA 91702		4b. Tel. No. (626) 815-9794
		4c. Cell No.
		4d. Fax No. (626) 815-0165
		4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Association of Heat & Frost Insulators and Allied Workers, AFL-CIO		
6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.		Tel. No. (510) 337-1001
		Office, if any, Cell No.
		Fax No. (510) 337-0123
By <u>David A. Rosenfeld</u> (signature of representative or person making charge)		e-Mail
David A. Rosenfeld, Attorney (Print name and title or office, if any)		
Address: Weinberg, Roger & Rosenfeld 1001 Marina Village Parkway, Suite 200 Alameda, CA 94501		January 20, 2015 (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

THIRD AMENDED

INTERNET
FORM NLRB-501
(2-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3612

DO NOT WRITE IN THIS SPACE

Case 21-CA-139031

Date Filed 4-10-15

INSTRUCTIONS:

File an original with NLRB Regional Director for the Region in which the alleged unfair labor practice occurred or is occurring

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT		
a. Name of Employer Coastal Marine Services, Inc.		b. Tel. No. (619) 291-8176
		c. Cell No.
		f. Fax No. (619) 291-8179
d. Address (Street, city, state, and ZIP code) 2255 National Avenue San Diego, CA	e. Employer Representative	g. e-Mail info@coastalmarineservices.com
		h. Number of workers employed 50+
i. Type of Establishment (factory, mine, wholesaler, etc.) Installation Contractor	j. Identify principal product or service Installation	
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.		
Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Within the last six months, the above named Employer has maintained and enforced [which includes implementing] illegal rules including an unlawful forced arbitration procedure that interfere with the Section 7 rights of employees.		
2. Full name of party filing charge (if labor organization, give full name, including local name and number) International Association of Heat & Frost Insulators and Allied Workers, Local 5		
4a. Address (Street and number, city, state, and ZIP code) 670 East Foothill Blvd. Unit 2 Azusa, CA 91702		4b. Tel. No. (626) 815-9794
		4c. Cell No.
		4d. Fax No. (626) 815-0165
		4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Association of Heat & Frost Insulators and Allied Workers, AFL-CIO		
6. DECLARATION		Tel. No. (510) 337-1001
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.		Office, if any, Cell No.
By <u>David A. Rosenfeld</u> (Signature of representative or person making charge)		Fax No. (510) 337-0123
David A. Rosenfeld, Attorney (Print/type name and title or office, if any)		e-Mail
Address: Weinberg, Roger & Rosenfeld 1001 Marina Village Parkway, Suite 200 Alameda, CA 94501		April 10, 2015 (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT 806781

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit 4

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

COASTAL MARINE SERVICES, INC.

and

Case 21-CA-139031

INTERNATIONAL ASSOCIATION OF HEAT &
FROST INSULATORS AND ALLIED WORKERS, LOCAL 5

COMPLAINT
AND
NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by International Association of Heat & Frost Insulators and Allied Workers, Local 5 (Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board, and alleges that Coastal Marine Services, Inc. (Respondent) has violated the Act as described below.

1. (a) The original charge in this proceeding was filed by the Union on October 17, 2014, and a copy was served by regular mail on Respondent on October 20, 2014.

(b) The first amended charge in this proceeding was filed by the Union on November 12, 2014, and a copy was served by regular mail on Respondent on November 13, 2014.

(c) The second amended charge in this proceeding was filed by the Union on January 21, 2015, and a copy was served by regular mail on Respondent on January 22, 2015.

(d) The third amended charge in this proceeding was filed by the Union on April 10, 2015, and a copy was served by regular mail on Respondent on April 13, 2015.

2. (a) At all material times, Respondent, a California corporation, with a warehouse facility located in San Diego, California, has been engaged in the nonretail business of performing insulation work on ships.

(b) During the 12-month period ending November 5, 2014, a representative period, Respondent, in conducting its business operations described above in paragraph 2(a), performed services valued in excess of \$50,000 in States other than the State of California.

(c) During the 12-month period ending November 5, 2014, Respondent, in conducting its operations described above in paragraph 2(a), purchased and received at its San Diego, California facility goods valued in excess of \$50,000 directly from points outside the State of California.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. At all material times, the union has been a labor organization within the meaning of Section 2(5) of the Act.

4. (a) At all material times, and since at least April 25, 2014, Respondent has maintained as a condition of employment for all of its employees at the San Diego facility an agreement titled "Employee Acknowledgement and Agreement", a copy of which is attached as Appendix A, that contains provisions requiring employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any rights they have to resolve disputes through collective or class action.

(b) At all material times, and since at least on or about April 25, 2014, employees would reasonably conclude that the provisions of the Employee Acknowledgement and

Agreement, described above in paragraph 4(a) and as fully set forth in Appendix A, preclude employees from engaging in conduct protected by Section 7 of the Act.

5. About April 25, 2014, Respondent, by issuing an Employee Handbook, promulgated and since then has maintained the following rules:

(a) To maintain the security of our premises and systems, and the privacy of our employees and customers, the Company prohibits unauthorized photography, and audio or video recording of its employees, confidential documents, or customers.

(b) Employees are strictly prohibited from taking any photographs or videos using any handheld device on Company premises.

(c) Employees are prohibited from the following. Posting a photograph of a supervisor, manager, vendor, supplier, or customer without their express permission.

(d) E-Mail, facsimile machines, and voice mail may not be used to advertise or solicit employees.

(e) No information should be given regarding any employee by any other employee or manager to an outside source.

6. By the conduct described above in paragraphs 4 and 5, Respondent has been interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

7. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be received by this office on or before **June 11, 2015**, or postmarked on or before **June 10, 2015**. Respondent

should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

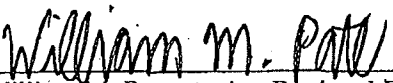
An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT during the calendar call commencing at 1:00 p.m., PDT, on the 17th day of August, 2015, at the Schwartz Federal Building, 4224 Balboa Park Conference Room, 880 Front Street, 4th Fl., San Diego, CA 92101, a hearing will be conducted before an Administrative Law Judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338. The precise order of all cases to be heard on this calendar call will be determined no later than the close of business on the Friday preceding the calendar call.

DATED at Los Angeles, California, this 28th day of May, 2015.



William M. Pate, Acting Regional Director
National Labor Relations Board, Region 21
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449

Attachments

EMPLOYEE ACKNOWLEDGMENT AND AGREEMENT

By signing below, this acknowledges that I have received a copy of the CMS ("Company") Employee Handbook and I will familiarize myself with its contents.

1. I acknowledge that nothing in the Employee Handbook creates or is intended to create a promise or representation of continued employment and that my employment, position, and compensation at the Company are at-will, shall be for no specific duration, and may be changed or terminated at the will of the Company. Both I and the Company have the right to terminate my employment at any time, with or without cause or notice. By signing below, I certify that I understand that employment at-will is the sole and entire agreement between myself and the Company concerning the duration of my employment and the circumstances under which my employment may be terminated. It supersedes all prior agreements, understandings, and representations (whether written or oral) concerning the duration of my employment with the Company and/or the circumstances under which my employment may be terminated.

2. I and the Company agree to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to my employment, including but not limited to the termination of my employment and my compensation. I and the Company each specifically waive and relinquish our respective rights to bring a claim against the other in a court of law, and this waiver shall be equally binding on any person who represents or seeks to represent me or the Company in a lawsuit against the other in a court of law. Both I and the Company agree that any claim, dispute, and/or controversy that I may have against the Company (or its owners, directors, officers, managers, employees, or agents), or the Company may have against me, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act ("FAA"), in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). The FAA applies to this agreement because the Company's business involves interstate commerce. For example, the Company buys and sells parts and materials across state lines. Included within the scope of this Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination, harassment and/or retaliation, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise. The only exception to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, Employment Development Department claims, or as may otherwise be required by state or federal law. However, nothing herein shall prevent me from filing and pursuing proceedings before the California Department of Fair Employment and Housing, or the United States Equal Employment Opportunity Commission (although if I choose to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to the provisions of this Agreement). By this binding arbitration provision, I acknowledge and agree that both the Company and I give up our respective rights to trial by jury of any claim I or the Company may have against the other.

3. All claims brought under this binding arbitration agreement shall be brought in the individual capacity of myself or the Company. This binding arbitration agreement shall not be construed to allow or permit the consolidation or joinder of other claims or controversies involving any other

employees, or permit such claims or controversies to proceed as a class action, collective action, private attorney general action or any similar representative action. No arbitrator shall have the authority under this agreement to order any such class or representative action. By signing this agreement, I am agreeing to waive any substantive or procedural rights that I may have to bring an action on a class, collective, private attorney general, representative or other similar basis. However, due to the nature of this waiver, the Company has provided me with the ability to choose to retain these rights by affirmatively checking the box at the end of this paragraph. Accordingly, I expressly agree to waive any right I may have to bring an action on a class, collective, private attorney general, representative or other similar basis, unless I check this box: ☐

4. I acknowledge that this agreement is not intended to interfere with my rights to collectively bargain, to engage in protected, concerted activity, or to exercise other rights protected under the National Labor Relations Act, and that I will not be subject to disciplinary action of any kind for opposing the arbitration provisions of this Agreement.

5. In addition to any other requirements imposed by law, the arbitrator selected shall be a retired California Superior Court Judge, or an otherwise qualified individual to whom the parties mutually agree, and shall be subject to disqualification on the same grounds as would apply to a judge of such court. All rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8 shall apply and be observed. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise, all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. Resolution of all disputes shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including but not limited to, notions of "just cause") other than such controlling law.

6. Within thirty days of the arbitrator's final written opinion and order, the opinion shall be subject to affirmation, reversal or modification, at either party's written request, following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial.

7. This is the entire agreement between myself and the Company regarding dispute resolution, the length of my employment, and the reasons for termination of my employment, and this agreement supersedes any and all prior agreements regarding these issues. Oral representations or agreements made before or after my employment do not alter this Agreement.

8. If any term or provision, or portion of this Agreement is declared void or unenforceable it shall be severed and the remainder of this Agreement shall be enforceable.

MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS. I FURTHER

UNDERSTAND THAT THIS AGREEMENT REQUIRES ME TO ARBITRATE ANY AND ALL
DISPUTES THAT ARISE OUT OF MY EMPLOYMENT.

DO NOT SIGN UNTIL YOU HAVE READ THE ABOVE ACKNOWLEDGMENT AND
AGREEMENT.

Print Full Name

Signature

Date

[RETAIN IN EMPLOYEE PERSONNEL FILE]

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. You may be represented at this hearing by an attorney or other representative. If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.
- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 21-CA-139031

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Coastal Marine Services, Inc.
2255 National Avenue
San Diego, CA 92113-3614

L. Brent Garrett, Attorney at Law
Warren L. Nelson, Attorney at Law
Fisher & Phillips LLP
2050 Main Street, Suite 1000
Irvine, CA 92614

International Association of Heat & Frost Insulators and
Allied Workers, Local 5, AFL-CIO
670 East Foothill Boulevard, Unit 2
Azusa, CA 91702

David A Rosenfeld, Attorney at Law
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway Suite 200
Alameda, CA 94501

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

COASTAL MARINE SERVICES, INC.

and

INTERNATIONAL ASSOCIATION OF HEAT &
FROST INSULATORS AND ALLIED WORKERS, LOCAL 5

Case 21-CA-139031

AFFIDAVIT OF SERVICE OF: COMPLAINT AND NOTICE OF HEARING (with forms NLRB-4338 and NLRB-4668 attached)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on May 28, 2015, I served the above-entitled document(s) by **certified and regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

Coastal Marine Services, Inc.
2255 National Avenue
San Diego, CA 92113-3614

**CERTIFIED MAIL,
RETURN RECEIPT REQUESTED**
(7003 1680 0005 0338 6956)

L. Brent Garrett, Attorney at Law
Warren L. Nelson, Attorney at Law
Fisher & Phillips LLP
2050 Main Street, Suite 1000
Irvine, CA 92614

REGULAR MAIL

International Association of Heat & Frost Insulators and
Allied Workers, Local 5, AFL-CIO
670 East Foothill Boulevard, Unit 2
Azusa, CA 91702

CERTIFIED MAIL
(7003 1680 0005 0338 6963)

David A Rosenfeld, Attorney at Law
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway Suite 200
Alameda, CA 94501

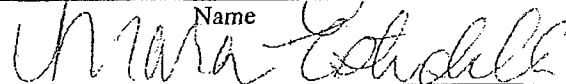
REGULAR MAIL

May 28, 2015

Date

Mara Estudillo, Designated Agent of NLRB

Name



Signature

L. Brent Garrett
Warren L. Nelson
FISHER & PHILLIPS LLP
2050 Main Street, Suite 1000
Irvine, CA 92614
(949) 851-2424
Fax (949) 851-0152
Email: bgarrett@laborlawyers.com
wnelson@laborlawyers.com

Attorneys for Respondent Coastal Marine Services, Inc.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

COASTAL MARINE SERVICES, INC.)	
)	CASE NO. 21-CA-139031
and)	
)	
INTERNATIONAL ASSOCIATION OF HEAT &)	
FROST INSULATORS AND ALLIED WORKERS,)	
LOCAL 5)	

**RESPONDENT COASTAL MARINE SERVICES, INC.'S ANSWER AND AFFIRMATIVE
DEFENSES TO THE COMPLAINT**

Comes now Respondent COASTAL MARINE SERVICES, INC. ("CMSI"), by and through undersigned Counsel, and, pursuant to Section 102.23 of the Board's Rules and Regulations, as amended, timely files the following Answer and Affirmative Defenses to the Complaint ("Complaint") issued by the Regional Director on May 28, 2015.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

To the extent that the Complaint encompasses any allegations occurring more than six months prior to the filing of an underlying charge with the National Labor Relations Board (NLRB) and the service of such charge upon CMSI, such allegations are time-barred by Section 10(b) of the National Labor Relations Act, as amended (hereinafter "NLRA").

SECOND DEFENSE

To the extent that the Complaint fails to give CSMI fair and adequate notice of the underlying charges, it denies CSMI its right to due process under the U.S. Constitution, its right to notice of the charges under Section 10 of the NLRA, and its right to notice and a fair hearing under the Board's Rules and Regulations.

THIRD DEFENSE

The Complaint is invalid to the extent it fails to state a claim upon which relief may be granted.

FOURTH DEFENSE

The Complaint is invalid to the extent that that General Counsel has pled legal conclusions rather than required factual allegations.

FIFTH DEFENSE

The Complaint is invalid to the extent that it contains allegations that were not included within a timely-filed, pending unfair labor practice charge against CSMI.

SIXTH DEFENSE

The Complaint is invalid in that it is vague and imprecise in regard to the alleged actions of the Employer.

ANSWERS TO NUMBERED AND UNNUMBERED PARAGRAPHS


Responding to the initial unnumbered paragraphs of the Complaint, CSMI denies that it has committed any unfair labor practices.

1. Responding to Paragraphs 1(a) through 1(d) of the Complaint, CSMI admits that the charges and amendments were filed on the dates listed and that CSMI has received them, but CSMI has no knowledge as to the dates on which the Board placed them in the mail.

2. Responding to Paragraph 2(a) of the Complaint, CSMI admits only that it maintains a facility in San Diego, California, and has performed insulation work on ships.
3. Responding to Paragraphs 2(b) to 2(d) of the Complaint, CSMI admits the allegations contained therein.
4. Responding to Paragraph 3 of the Complaint, CSMI admits the allegation contained therein.
5. Responding to Paragraphs 4(a) and 4(b) of the Complaint, CSMI denies the allegations contained therein.
6. Responding to Paragraphs 5(a) through 5(e) of the Complaint, CSMI denies the allegations contained therein.
7. Responding to Paragraph 6 of the Complaint, CSMI denies the allegations contained therein.
8. Responding to Paragraph 7 of the Complaint, CSMI denies the allegations contained therein.

WHEREFORE, having fully answered the Complaint, CSMI prays that it be dismissed in its entirety, or in the alternative, that Counsel for the General Counsel be held to strict proof as to all allegations not specifically admitted.

Respectfully submitted this 10th day of June, 2015.


L. Brent Garrett
For FISHER & PHILLIPS LLP
COUNSEL FOR RESPONDENT
COASTAL MARINE SERVICES, INC.

L. Brent Garrett
Warren L. Nelson
FISHER & PHILLIPS LLP
2050 Main Street, Suite 1000
Irvine, CA 92614
(949) 851-2424
Fax (949) 851-0152
Email: bgarrett@laborlawyers.com
wnelson@laborlawyers.com

Attorneys for Respondent Coastal Marine Services, Inc.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

COASTAL MARINE SERVICES, INC.)	
)	CASE NO. 21-CA-139031
and)	
)	
INTERNATIONAL ASSOCIATION OF HEAT &)	
FROST INSULATORS AND ALLIED WORKERS,)	
LOCAL 5)	

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2015, I e-filed the foregoing ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT using the Board's e-filing system, and immediately thereafter served it by electronic mail upon the following:

Olivia Garcia
Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa St., Ninth Floor
Los Angeles, CA 90017-5449
olivia.garcia@nlrb.gov

William M. Pate
Acting Regional Director
National Labor Relations Board, Region 21
888 S. Figueroa St., Ninth Floor
Los Angeles, CA 90017-5449
william.pate@nlrb.gov

Winkfield F. Twyman, Jr.
Field Attorney
National Labor Relations Board, Region 21
555 West Beech Street, Suite 418
San Diego, CA 92101-2940
winkfield.twyman@nrlrb.gov

David A. Rosenfeld, Attorney at Law
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
drosenfeld@unioncounsel.net

A handwritten signature in black ink, appearing to read "L. Brent Garrett", written over a horizontal line.

L. Brent Garrett
For FISHER & PHILLIPS LLP
COUNSEL FOR RESPONDENT
COASTAL MARINE SERVICES, INC.

EMPLOYEE ACKNOWLEDGMENT AND AGREEMENT

By signing below, this acknowledges that I have received a copy of the CMS ("Company") Employee Handbook and I will familiarize myself with its contents.

1. I acknowledge that nothing in the Employee Handbook creates or is intended to create a promise or representation of continued employment and that my employment, position, and compensation at the Company are at-will, shall be for no specific duration, and may be changed or terminated at the will of the Company. Both I and the Company have the right to terminate my employment at any time, with or without cause or notice. By signing below, I certify that I understand that employment at-will is the sole and entire agreement between myself and the Company concerning the duration of my employment and the circumstances under which my employment may be terminated. It supersedes all prior agreements, understandings, and representations (whether written or oral) concerning the duration of my employment with the Company and/or the circumstances under which my employment may be terminated.

2. I and the Company agree to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to my employment, including but not limited to the termination of my employment and my compensation. I and the Company each specifically waive and relinquish our respective rights to bring a claim against the other in a court of law, and this waiver shall be equally binding on any person who represents or seeks to represent me or the Company in a lawsuit against the other in a court of law. Both I and the Company agree that any claim, dispute, and/or controversy that I may have against the Company (or its owners, directors, officers, managers, employees, or agents), or the Company may have against me, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act ("FAA"), in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). The FAA applies to this agreement because the Company's business involves interstate commerce. For example, the Company buys and sells parts and materials across state lines. Included within the scope of this Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination, harassment and/or retaliation, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise. The only exception to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, Employment Development Department claims, or as may otherwise be required by state or federal law. However, nothing herein shall prevent me from filing and pursuing proceedings before the California Department of Fair Employment and Housing, or the United States Equal Employment Opportunity Commission (although if I choose to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to the provisions of this Agreement). By this binding arbitration provision, I acknowledge and agree that both the Company and I give up our respective rights to trial by jury of any claim I or the Company may have against the other.

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employees, or permit such claims or controversies to proceed as a class action, collective action, private attorney general action or any similar representative action. No arbitrator shall have the authority under this agreement to order any such class or representative action. By signing this agreement, I am agreeing to waive any substantive or procedural rights that I may have to bring an action on a class, collective, private attorney general, representative or other similar basis. However, due to the nature of this waiver, the Company has provided me with the ability to choose to retain these rights by affirmatively checking the box at the end of this paragraph. Accordingly, I expressly agree to waive any right I may have to bring an action on a class, collective, private attorney general, representative or other similar basis, unless I check this box: []

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6. Within thirty days of the arbitrator's final written opinion and order, the opinion shall be subject to affirmation, reversal or modification, at either party's written request, following review of the record and arguments of the parties by a second arbitrator who shall, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following court trial.

7. This is the entire agreement between myself and the Company regarding dispute resolution, the length of my employment, and the reasons for termination of my employment, and this agreement supersedes any and all prior agreements regarding these issues. Oral representations or agreements made before or after my employment do not alter this Agreement.

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MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS. I FURTHER

UNDERSTAND THAT THIS AGREEMENT REQUIRES ME TO ARBITRATE ANY AND ALL DISPUTES THAT ARISE OUT OF MY EMPLOYMENT.

DO NOT SIGN UNTIL YOU HAVE READ THE ABOVE ACKNOWLEDGMENT AND AGREEMENT.

Print Full Name

Signature

Date

[RETAIN IN EMPLOYEE PERSONNEL FILE]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

COASTAL MARINE SERVICES, INC.

and

Case 21-CA-139031

INTERNATIONAL ASSOCIATION OF HEAT &
FROST INSULATORS AND ALLIED WORKERS, LOCAL 5

ORDER WITHDRAWING PARAGRAPH 5(c) OF
COMPLAINT AND NOTICE OF HEARING AND
DISMISSING CORRESPONDING PORTION OF
CHARGE IN CASE 21-CA-139031

On May 28, 2015, the Acting Regional Director for Region 21 issued a Complaint and Notice of Hearing in the above-captioned case. Upon further consideration of the rules in Respondent's Employee Handbook it has been determined that the rule corresponding to paragraph 5(c) of the Complaint and Notice of Hearing is not unlawful, as employees would not reasonably believe that the rule restricted them from engaging in Section 7 rights.

IT IS HEREBY ORDERED that paragraph 5(c) of the Complaint and Notice of Hearing is withdrawn, and the corresponding portion of the charge in Case 21-CA-139031 is dismissed.

Your Right to Appeal: The Charging Party may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If the Charging Party appeals, it may use the enclosed Appeal Form, which is also available at www.nlr.gov. However, the Charging Party is encouraged to also submit a complete statement of the facts and reasons why it believes my decision was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax or email. To file an appeal electronically, go to the Agency's website at www.nlr.gov, click on **E-File Documents**, enter the **NLRB Case Number**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the **General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1015 Half Street SE, Washington, DC 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

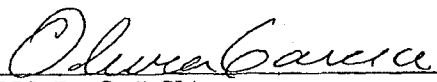
Appeal Due Date: The appeal is due on **September 17, 2015**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than September 16, 2015. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington, DC, by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

Extension of Time to File Appeal: The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before September 17, 2015**. The request may be filed electronically through the *E-File Documents* link on our website www.nlr.gov, by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after September 17, 2015, **even if it is**

postmarked or given to the delivery service before the due date. Unless filed electronically, a copy of the extension of time should also be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

DATED at Los Angeles, California, this 3rd day of September, 2015.



OLIVIA GARCIA
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 21
888 S FIGUEROA ST FL 9
LOS ANGELES, CA 90017-5449

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

COASTAL MARINE SERVICES, INC.

and

Case 21-CA-139031

INTERNATIONAL ASSOCIATION OF HEAT &
FROST INSULATORS AND ALLIED WORKERS,
LOCAL 5, AFL-CIO

**AFFIDAVIT OF SERVICE OF: ORDER WITHDRAWING PARAGRAPH 5(c) OF
COMPLAINT AND NOTICE OF HEARING AND DISMISSING CORRESPONDING
PORTION OF CHARGE IN CASE 21-CA-139031.**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on September 3, 2015, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

L. BRENT GARRETT, ATTORNEY
FISHER & PHILLIPS LLP
2050 MAIN STREET, SUITE 1000
IRVINE, CA 92614

WARREN L. NELSON, ATTORNEY AT LAW
FISHER & PHILLIPS LLP
2050 MAIN STREET, SUITE 1000
IRVINE, CA 92614

COASTAL MARINE SERVICES, INC.
2255 NATIONAL AVENUE
SAN DIEGO, CA 92113-3614

DAVID A ROSENFELD, UNION COUNSEL
WEINBERG ROGER & ROSENFELD
1001 MARINA VILLAGE PARKWAY SUITE 200
ALAMEDA, CA 94501

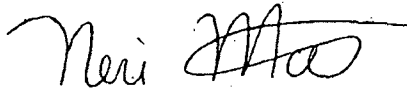
INTERNATIONAL ASSOCIATION OF HEAT &
FROST INSULATORS AND ALLIED WORKERS,
LOCAL 5, AFL-CIO
670 EAST FOOTHILL BOULEVARD, UNIT 2
AZUSA, CA 91702

September 3, 2015

Date

Neri Martinez, Designated Agent of NLRB

Name



Signature

STATEMENT OF SERVICE

I hereby certify that a copy of the **PARTIAL STIPULATION OF FACTS WITH EXHIBITS** were submitted by e-filing to the Division of Judges of the National Labor Relations Board on December 4, 2015.

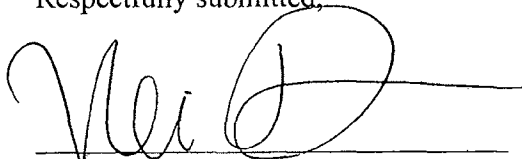
The following parties were served with a copy of said documents by electronic mail on December 4, 2015:

L. Brent Garrett, Attorney at Law
Fisher & Phillips, LLP
bgarrett@laborlawyers.com

Warren L. Nelson, Attorney at Law
Fisher & Phillips LLP
wnelson@laborlawyers.com

David A Rosenfeld, Union Counsel
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drosenfeld@unioncounsel.net

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Neri Martinez', written over a horizontal line.

Neri Martinez
Compliance Assistant
National Labor Relations Board
Region 21

Ami Silverman
Field Attorney
National Labor Relations Board
Region 21
888 So. Figueroa St. 9th Floor
Los Angeles CA 90017
ami.silverman@NLRB.gov

/s/ Danielle H. Moore

Danielle H. Moore
For FISHER & PHILLIPS LLP
COUNSEL FOR RESPONDENT
COASTAL MARINE SERVICES, INC.